

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 14 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0179-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOHN MULHOLLAND,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-38313

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

John Mulholland

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement entered in May 1993, petitioner John Mulholland was convicted of attempted sexual conduct with a minor under the age of fourteen and attempted molestation of a child under the age of fourteen. The trial court sentenced him to presumptive, consecutive prison terms of ten years on each count. In this, his third petition for review of the denial of post-conviction relief, Mulholland contends the

trial court erred when it dismissed his notice of post-conviction relief. Absent an abuse of discretion, we will not disturb the trial court's order. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). We see no such abuse here.

¶2 In Mulholland's first post-conviction proceeding, he claimed his counsel had failed to advise him accurately of the sentencing possibilities under the plea agreement. The trial court denied relief, and we denied relief on review. *State v. Mulholland*, No. 2 CA-CR 94-0425-PR (memorandum decision filed Dec. 22, 1994). On review to this court from a second post-conviction proceeding, we granted Mulholland relief in part because the trial court had dismissed his notice of post-conviction relief without permitting him to file a petition. In that notice of post-conviction relief, he had claimed he intended to raise a claim under Rule 32.1(g), Ariz. R. Crim. P., based on a significant change in the law. *State v. Mulholland*, No. 2 CA-CR 99-0427-PR (memorandum decision filed Jan. 27, 2000). But we rejected his claim that the trial court had abused its discretion by denying his request for appointed counsel, finding it is for the trial court to decide whether to appoint counsel in a successive petition.

¶3 In this post-conviction proceeding, appointed counsel Wanda Day filed a notice pursuant to Rule 32.4(c) stating she had reviewed the entire record and found no colorable claim to raise. She then set forth the facts of the case in the event Mulholland chose to file a supplemental petition and asked the trial court to give him forty-five days to do so. The trial court entered an order giving Mulholland until January 30, 2008, to file a petition; the order reflected that a copy was sent to Mulholland. In February, the trial court

dismissed the pending post-conviction proceeding because Mulholland had “failed to file a petition for post conviction relief within the allotted time.” The court added, “[N]o colorable claim for relief ha[d] been raised in the previous notice or petition.” The court also denied Mulholland’s motion for rehearing.

¶4 On review, Mulholland contends he had believed he was represented by attorney Wanda Day since October 2005 and he had received no “instructions from the superior court regarding his representation and the filing of his petition for post-conviction relief.” But, based on the record before us, Mulholland knew or should have known that it was his obligation to file a pro se petition for post-conviction relief if he chose to do so. We cannot say the court abused its discretion by so concluding, by dismissing the proceeding when Mulholland failed to file the supplemental petition, or by finding no good cause to reconsider that ruling when it ruled on Mulholland’s motion for rehearing.

¶5 The petition for review is granted but, for the reasons stated, relief is denied.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge